Petition

81-571

Office Supreme Court, U.S.
FILED
SEP 16 1981
ALEXANDER L. STEVAS,
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FRED G. CLARK, Father of
Michael Ray Clark, Deceased

Petitioners

versus

SHIRLEY D. PAYNE,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MICHAEL R. EUBANKS
Eubanks, Temple & Hudson
P. O. Box 696
Purvis, Mississippi 39475
Telephone 601-794-8003
ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Was the Petitioner denied his fundamental rights of due process of law as guaranteed by the Fifth Amendment in that the jury in the District Court below was erroneously instructed as to the applicable law in Mississippi under the doctrine adhered to by *Erie Railroad Co. v. Tompkins* 304 U. S. 64 (1938), concerning the legal reasonable standard of duty of a driver executing a turn across an oncoming lane of a public throughfare into a private driveway?

2. Was the Petitioner denied his fundamental rights of due process of law as guaranteed by the Fifth Amendment because of the adverse and biased affect of opposing counsel, Harry R. Allen's name being proffered for the position of United States Circuit Judge for the Fifth Circuit which fact was known in the inner judicial circles of the Fifth Circuit, but unknown to the Petitioner or his counsel at the time of hearing and judgment of the Fifth Circuit Court of Appeals?

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United States Constitution Cited:

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§ 11-7-15 Mississippi Code Annotated (1972) 3, 9

Rules Cited:

5th Cir. R. 21 7

IN THE
SUPREME COURT OF THE UNTIED STATES
OCTOBER TERM, 1981

No.

FRED G. CLARK, Father of
Michael Ray Clark, Deceased

Petitioner

versus

SHIRLEY D. PAYNE,

Respondent

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on May 21, 1981, rehearing denied on June 18, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals affirming a judgment for the Defendant, Shirley D. Payne and denying Petition for Rehearing were not reported, but for the convenience of this Court are reproduced in appendices A and B respectively of this

Petition. The order issued by the District Court for the Southern District of Mississippi denying a new trial was not reported, but is set forth in Appendix C of this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered in May 21, 1981, petition for rehearing denied on June 18, 1981, and copies thereof are appended to this petition in appendices A and B. The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Was the Petitioner denied his fundamental rights of due process of law as guaranteed by the Fifth Amendment in that the jury in the District Court below was erroneously instructed as to the applicable law in Mississippi under the doctrine adhered to by *Erie Railroad Co. v. Tompkins* 304 U. S. 64 (1938), concerning the legal reasonable standard of duty of a driver executing a turn across an oncoming lane of a public throughfare into a private driveway?

2. Was the Petitioner denied his fundamental rights of due process of law as guaranteed by the Fifth Amendment because of the adverse and biased affect of opposing counsel, Harry R. Allen's name being proffered for the position of United States Circuit Judge for the Fifth Circuit which fact was known in the inner judicial circles of the Fifth Circuit, but unknown to the Petitioner or his counsel at the time of hearing and judgment of the Fifth Circuit Court of Appeals?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall be . . . deprived of life, liberty or property, without due process of law. . .

STATUTES INVOLVED

Pertinent Mississippi statutory provisions are:

1. Section 63-3-707, **Mississippi Code Annotated** (1972):

No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the manner provided in this article in the event any other vehicle may be affected by such movement.

A signal of intention to turn right or left shall be given continuously for a reasonable distance before turning.

No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided in this article to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.

2. Section 11-7-15, **Mississippi Code Annotated** (1972):

In all actions hereafter brought for personal injuries, or

where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

STATEMENT OF THE CASE

This suit was originally brought in the Southern District Court of Mississippi with jurisdiction based upon the diversity of citizenship of the litigants. The action was for the wrongful death of the Petitioner's nineteen year old son, Michael Ray Clark. On May 23, 1978, Michael Ray Clark was returning to his home in Slidell, Louisiana from his work in Pearl River County, Mississippi. He was traveling on a major county road on a motorcycle, proceeding in a Southerly direction. The Defendant, Shirley D. Payne, who was driving an Oldsmobile Station Wagon, attempted to execute a left turn on a road to enter the driveway of her home. As the turn was attempted, Mrs. Payne cut across the oncoming lane of traffic in which the Petitioner's son was traveling. He swerved to the outside shoulder of the road, but nevertheless was struck by the station wagon driven by the Defendant, and died some few moments later on the scene.

The road upon which the two motorists traveled was a paved, double-center lined, eighteen foot wide road. Before beginning to attempt her turn, Mrs. Payne had an unobstructed view of all oncoming traffic traveling in the opposite lane for at least 410 feet.

The impact occurred on the outside shoulder of the lane of travel at a point where the Defendant's station wagon had not reached her driveway. At the time of the impact the Defendant's left front tire was located on the shoulder edge of the pavement just before her driveway and the right rear tire was on the double centerline of the road at approximately a forty-five degree angle. The Defendant was cutting the corner of her driveway causing her to be in the oncoming lane for a prolonged period of time and also crossing into the oncoming lane at a point where the oncoming traffic could not see her relation to the double line on her side of the small knoll in the road. (See Appendix D). It was undisputed that Michael Ray Clark died as a result of the collision with the station wagon. The disputed issue presented for the jury at the District Court below was the question of proximate casuation of the collision. The Petitioner charged that the proximate cause or contributing cause of the collision was the Defendant, Shirley D. Payne's negligent operation of her vehicle. The Defendant's manner of executing the turn was improper and totally inconsistent with the applicable laws of Mississippi. She failed to position her car properly before attempting the turn. This fact was apparent as depicted in the enlarged photos taken shortly after the accident by a state-patrol officer which photographs were displayed at the trial. (See Appendix D). By failing to properly position the automobile, failing to keep a proper lookout for oncoming traffic before executing the turn, and by failure to use diligence in clearing the oncoming lane of traffic, the Defendant was negligent. The Defendant's station wagon cut the corner of her driveway and placed those in the oncoming lane in a position of unreasonalbe danger and thus violated her due care.

In her testimony given before the District Court, the Defen-

dant, Mrs. Payne, admitted that she was not keeping a proper lookout for oncoming vehicles in the Southerly lane as she was attempting the turn into her driveway. Mrs. Payne's testimony indicated that her attentions were diverted to members of her family which were standing in the yard surrounding her home and to a horse located in a field behind the home. Her testimony, as well as the photographs displayed at the trial, indicated that she had not properly positioned her car for the turn. Having positioned herself in the oncoming lane in such a manner she was not observing "reasonable safety," as required by **S** 63-3-707 **Mississippi Code Annotated** (1972).

Testimony was presented on behalf of the Defendant, Mrs. Payne, attempting to indicate that the decedent was speeding. The Defendant also attempted to present circumstances, to imply speed, such as how fast the motorcycle could possibly travel as measured by the speedometer, the damages sustained by the station wagon and the position of the Petitioner's son just before the crash. However, no one saw the bike before impact and there was no objective witness who could testify as to the speed of the bike.

A jury-trial ended with a verdict for the Defendant, Shirley D. Payne. The District Judge in the Southern District of Mississippi refused to grant a requested jury instruction on the applicable Mississippi law and the resulting jury instructions clearly biased the law in the Defendant's favor. A proper motion for a new trial was denied and because the Petitioner and his family felt that the Judge had not properly instructed the jury under the applicable Mississippi Law and that a properly instructed jury, basing its verdict on the applicable law and evidence would not have found for the Defendant, an appeal was

taken to the Court of Appeals.

The jury instruction appearing in Appendix E, *infra*, tendered by the Petitioner, set forth the existing legal standard of ordinary care of a driver turning across an oncoming lane of a public throughfare. The standard is derived from pertinent Mississippi case law which would apply equally to the Federal Court systems under the *Erie* doctrine. The District Court Judge refused to properly instruct the jury, allowing only a general instruction of the ordinary standard of care without reference to the legal standard of ordinary care of one executing a turn across an oncoming lane of traffic.

On Appeal the Fifth Circuit summarily affirmed the decision below and refused Petitioner's motion for rehearing. On May 21, 1981, at the time the case was heard and a decision was rendered by the Fifth Circuit Panel, the name of opposing counsel, Harry R. Allen, had been offered for the position of United States Circuit Judge for the Fifth Circuit. This fact was known by Mr. Allen and the Circuit Court community at the time of the oral arguments and consideration of this case. The arguments were heard on May 21, 1981, said case appearing last upon the docket. On that same day the Court entered an order affirming the District Court's decision pursuant to the Fifth Circuit's Local Rule 21. On June 18, 1981, the same panel of Judges denied Petitioner's Petition for rehearing. The nomination however was unknown to Petitioner or his counsel at the time of the original hearing before the Fifth Circuit or at the time of petitioning for rehearing.

The proffering of counsel to sit on the same bench before which he is arguing obviously placed the opposing counsel at a

decided disadvantage. For everyone but the opposing counsel to know this fact further hamstrung the ability of opposing counsel to adequately protect the right of his client. The Court's disposing of Petitioner's argument in an immediate summary order revealed evidence that judicious consideration was not given in this case.

REASON FOR GRANTING THE WRIT

Certiorari should be granted to review the holding of the Court below so that the Petitioner may receive those rights and benefits of due process guaranteed to all who bring their grievances before the judicial system of the Federal Courts. The Petitioner was denied that right of due process when the District Judge refused to instruct the jury properly. The Fifth Circuit's affirmance of the District Court's refusal departs from and is in conflict with the law as it exists in the state court of last resort in Mississippi. The Petitioner was again denied that right of due process when the decision of the Court of Appeals was rendered under circumstances which effected their objective consideration of the Petitioner's claim. The claim on its merits was not considered at a fair hearing at the trial or on appeal, thereby violating Petitioner's Fifth Amendments rights.

I.

In refusing Petitioner's jury instruction number P-24 (Appendix E) or some variation thereof, the jury of the District Court below was erroneously instructed as to the applicable Mississippi law, and thus the Petitioner was deprived of the due process rights guaranteed by the Fifth Amendment. Under the *Erie* Doctrine, the Petitioner, though appearing in the Federal

Court system, was legally entitled to the same rights and benefits of the substantive law of Mississippi's Court system. *Erie v. Tompkins* 304 U. S. 64 (1938).

In Mississippi, in addition to the statutory command of **Mississippi Code Annotated** Section 63-3-707 (1972), a number of cases have been decided which have established the legal standard of care or duty to which a motorist is held to when executing a turn across oncoming traffic. The standard, though a reasonable ordinary one, has evolved for the particular circumstances which are faced by a motorist, such as the Defendant in this case, who is turning across a lane which is utilized by oncoming traffic. The reasonable ordinary duty under this set of circumstances has been determined by the Mississippi Supreme Court to require that the turning party must first and foremost position his vehicle properly before turning and then that the turning party must keep a lookout ahead at all times and wait for a clear opportunity for any oncoming vehicle to pass. In addition, the Court has stated that the oncoming vehicle has the right to assume that the turning party will comply with these duties. *Harris v. McCuiston* 64 So. 2d 602, 217 Miss 601 (1953); *Cobb v. Williams* 90 So. 2d 17, 228 Miss 807 (1956).

In order to fully understand the standard of care that the Defendant should have observed, it was necessary that the jury be properly instructed so that they could properly determine the issue of proximate or contributory causation of the collision. Without being properly instructed on the standard of care for both the Petitioner and the Defendant, it was impossible for the jury to apply the law of comparative negligence which Mississippi follows. See: Section 11-7-15, **Mississippi Code Annotated**, (1972). Instead the instructions, taken as a whole

were erroneous and as such did not require of the Defendant to exercise due care in negotiating her left turn. In failing to state the proper standard the instructions placed the emphasis primarily upon the duty of the Petitioner's son to observe due care, while not not requiring a reasonable standard of safety by the Defendant. Thus, the verdict of the jury was based upon erroneous standards without due regards to the law of comparative negligence.

The Petitioner was entitled to instructions which properly and fully stated the applicable state law. The law that is followed by the Federal Courts, as the Fifth Circuit has in the past recognized, is as follows, "where a state-created right is to be enforced; the state must be looked to for the substance of the instructions . . . if [a] requested instruction in accord with party's contention is consistent with the evidence in the case, it *must* be granted unless the subject matter has been adequately covered in the charge . . ." *Boothe v. Holmes* 399 F 2d. 495, 500 (5th Cir. 1968), (emphasis added).

As previously stated, the Mississippi legislature has effected law that requires the motorist to proceed with a turn of a vehicle only when, "such movement can be made with reasonable safety . . ." **S 63-3-707 Mississippi Code Annotated** (1972). This is required in addition to an appropriate signal. The Mississippi courts, as also previously stated, have augmented the statute with case law and there has evolved a standard of "reasonable safety" with regards to turns made across the lanes of oncoming traffic. See: *Harris v. McCuiston* 64 So. 2d 602, 217 Miss 601 (1953); *Cobb v. Williams* 90 So. 2d 17, 229 Miss 807 (1956). The jury, not being fully aware of this standard, could not fairly determine the issue of proximate causation.

N being properly directed in its deliberations, the jury was n led so that they did not have a proper understanding of the i sues and their duties. They could not rightly determine that e Defendant was exercising reasonable safety so as to totally ee her from liablitiy for an act which placed her, as well as the Petitioner's deceased son in peril. Without the instruction no charge was presented to show that the Defendant had a duty to continue to look u the oncoming lane and to exercise great care when she put another in a needless position of peril, especially where, if we follow her defense, she claimed that her view was limited by the curve and knoll at her driveway which made observation difficult. The most important duties of the Defendant were never known by the jury. Further, the tenor of the charge as a whole was to place the burden of avoiding the collision on the shoulders of the decedent, regardless of the Defendant's self-confessed failure to keep a proper lookout. Had the jury been properly instructed on the duties of the Defendant with respect to her failure to properly position her car, to continue to look for vehicles in the oncoming lane and of the oncoming traffic's right to assume the turning car would comply with these duties it would have had to agree that the Defendant was negligent and that her negligence was at least a contributory cause of the death of Michael Ray Clark.

II.

As previously stated, in the past the Fifth Circuit in automobile accident cases has held that the instructions given to a jury deliberating in a federal court must properly and fully include state law applicable to a case. Furthermore, the court has held that refusal of specified requests for such instructions is reversible error requiring a new trial. *Boothe v. Holmes* 399 F

2d 495, 500 (5th Cir. 1968). Yet in 1981 this law is not adhered to as precedent for the Fifth Circuit when they stand in judgment of one of their potential peers. This, the Petitioner believes, results in a denial of the due process which has been guaranteed to each and every citizen who enters the Federal judicial system. Even if the bias resulted as an unconscious affect, it nonetheless acts as a deterent to citizens to use the Federal court system and taints those decisions which have been rendered in the past.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Michael R. Eubanks

Michael R. Eubanks, Attorney
Eubanks, Temple & Hudson
P. O. Box 696
Purvis, Mississippi 39475

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

NO. 80-3634

FRED G. CLARK, Father of
Michael Ray Clark, Deceased,

Plaintiff-Appellant,

versus

SHIRLEY D. PAYNE,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of
Mississippi

(May 21, 1981)

Before CHARLES CLARK, TATE and WILLIAMS,
Circuit Judges,

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Unit A

NO. 80-3634

FRED G. CLARK, Father of
Michael Ray Clark, Deceased,

Plaintiff-Appellant,

versus

SHIRLEY D. PAYNE,

Defendant-Appellee.

- - - - -

Appeal from the United States District Court
for the Southern District of
Mississippi

- - - - -

ON PETITION FOR REHEARING

(June 18, 1981)

Before CHARLES CLARK, TATE and WILLIAMS, Circui
Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearin
filed in the above entitled and numbered cause
be and the same is hereby denied.

s/ J. S. Williams
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

HATTIESBURG DIVISION

FRED G. CLARK, Father of MICHAEL RAY CLARK, DECEASED PLAINTIFF	)
SHIRLEY D. PAYNE	)CIVIL ACTION)NO. H79-0046 (R)
DEFENDANT	)

ORDER OVERRULING MOTION FOR NEW TRIAL

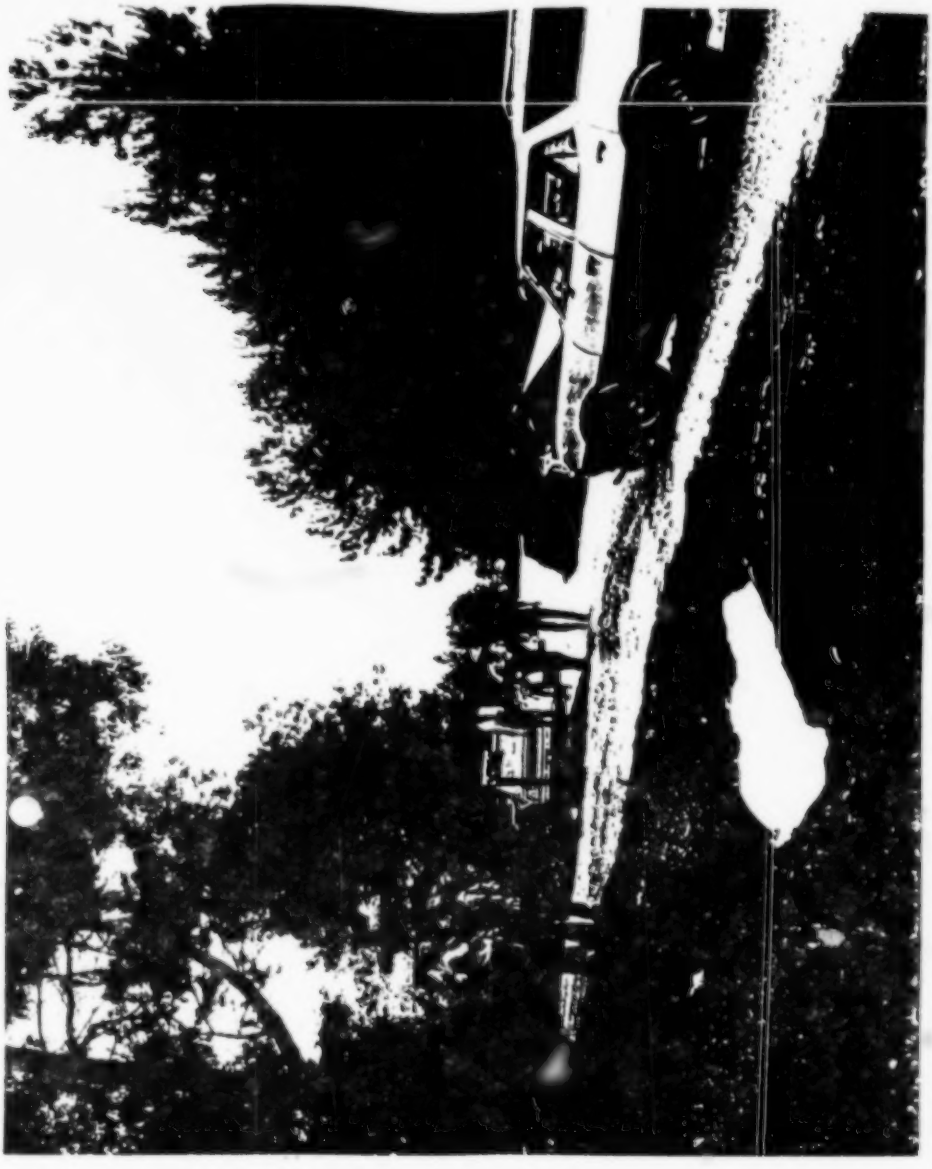
Came on this day the parties in the above styled and numbered cause on the motion of the Plaintiff for a new trial, and the Court having heard and considered argument of counsel, brief and being duly advised in the premises, finds that the Plaintiff's Motion for New Trial is not well taken and should therefore be overruled; it is therefore,

ORDERED AND ADJUDGED that Plaintiff's Motion for New Trial is hereby overruled.

ORDERED AND ADJUDGED this the 9th day of July, 1980.

s/ Dan M. Russell, Jr.
UNITED STATES
DISTRICT JUDGE

APPENDIX D



APPENDIX E

FRED G. CLARK, FATHER OF MICHAEL RAY CLARK, DECEASED PLAINTIFF	)	CIVIL ACTION
	)	NO. H79-0046 (R)
SHIRLEY D. PAYNE DEFENDANT	)	

JURY INSTRUCTION NO. P-24

You are instructed that Shirley Payne in driving her vehicle on a public road, intending to turn left across the oncoming lane into her driveway, must exercise care that she does not turn into the path of a vehicle coming toward her and she must take a proper position and must signal her intentions in the manner required by law and unless Mrs. Payne had sufficient time in which to turn to the left across the lane of oncoming traffic, she must wait for a clear opportunity and then proceed safely and that the oncoming traffic had the right to assume that Mrs. Payne would so and this right to so assume continued until they knew or, in the exercise of ordinary

care, should have known otherwise.

If you find from the preponderance of the evidence that Mrs. Payne failed to meet this standard of care for Michael Ray Clark under the facts and circumstances in this case, which failure, if any, was the proximate cause or proximate contributing cause of the accident, then you are to find for the Plaintiff, Fred Clark, as father and as the representative of the Clark family.

CERTIFICATE

I hereby certify that I have this day served three true and correct copies of the above and foregoing Petition for Writ of Certiorari upon Harry R. Allen, Esquire, Post Office Box 1601, Hattiesburg, Mississippi 39401, attorney of record for the Respondents, by placing the same in an envelope addressed to him at said address and placing the same in United States mail, postage prepaid. I further certify that all parties required to be served have been served.

Dated this 15th day of September, A.D., 1981.

Michael R. Eubanks

Counsel for Petitioner